ORIGINAL

Supreme Court, U.S.
FILED
MAR 31 2004
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term of 2003

No. 03-1235

STATE OF ARIZONA,
Petitioner,

v.

ANTHONY CHARLES DAVIS,
Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Anthony Charles Davis, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari without payment of costs and to proceed *in forma pauperis*.

Respondent sought leave to proceed *in forma pauperis* in state court and that leave was granted. Respondent proceeded through the Arizona state trial and appellate courts as an indigent with counsel appointed from the office of the Maricopa County Public Defender. An affidavit in support of this motion is attached.

RESPECTFULLY SUBMITTED this 31st day of March, 2004.

MARICOPA COUNTY PUBLIC DEFENDER

By _____

ANNA M. UNTERBERGER
Deputy Public Defender
Counsel of Record for Respondent
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Telephone: (602) 506-0918

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SUPREME COURT, U.S.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

UNITED STATES SUPREME COURT

STATE OF ARIZONA	)	
v.	)	**No. 03-1235**
ANTHONY CHARLES DAVIS	)	

I, ANTHONY CHARLES DAVIS, being first duly sworn, depose and say that I am the Respondent in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore; and that I believe I am entitled to redress.

I further swear that the following responses are true:

1. I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner at the Arizona Department of Corrections, where I currently reside.

2. I do not have any income from any business, profession or self-employment, nor do I receive any interest, dividends, or other source of income.

3. I have no checking or savings account and the only cash that I may possess is that which is within my prison account, which would be no more than a minimal amount.

4. I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

5. I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

Anthony Charles Davis
ANTHONY CHARLES DAVIS

SUBSCRIBED AND SWORN to before me this 24th day of March, 2004.

OFFICIAL SEAL
OSCAR FAVELA
NOTARY PUBLIC - State of Arizona
PINAL COUNTY
My Comm. Expires April 3, 2007

Oscar Favela
NOTARY PUBLIC

My commission expires:

04-3-2007

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BRIEF IN OPPOSITION TO

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QUESTION PRESENTED FOR REVIEW

Did the Arizona Supreme Court properly apply to the facts of this case this Court's test for gross disproportionality under the Eighth Amendment to the United States Constitution, before it found pursuant to Arizona law that Respondent's sentence was unconstitutional because it "shocked the conscience of society," and it applied, and remanded this case for resentencing pursuant to, A.R.S § 13-4037(B)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
ARGUMENT	6
THE PETITION SHOULD BE DENIED BECAUSE THE ARIZONA SUPREME COURT PROPERLY APPLIED TO THE FACTS OF THIS CASE THIS COURT'S TEST FOR GROSS DISPROPORTIONALITY UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION B EFORE I T F OUND PURSUANT TO ARIZONA LAW THAT THE SENTENCE WAS UNCONSTITUTIONAL BECAUSE IT "SHOCKED THE CONSCIENCE OF SOCIETY." THE ARIZONA SUPREME COURT THEN APPLIED, AND REMANDED THIS CASE FOR RESENTENCING PURSUANT TO, A.R.S. § 13-4037(B).	
CONCLUSION	11

TABLE OF AUTHORITIES

CASES **Page**

Ewing v. California, 538 U.S. 11 (2003) 6, 7, 8, 9

Harmelin v. Michigan, 501 U.S. 95 (1991) 6, 7, 11, 12

Lockyer v. Andrade, 538 U.S. 63 (2003) 8, 9

Michigan v. Long, 463 U.S. 1032 (1983) 6

Solem v. Helm, 463 U.S. 277 (1983) 11, 12

State v. (Randal) Davis, 498 P.2d 202 (Ariz. 1972) 11

State v. Williams, 854 P.2d 121 (Ariz. 1993) 7

CONSTITUTIONAL PROVISIONS

United States Constitution

Eighth Amendment ..... i, 1, 6, 7, 9

Fourteenth Amendment 1

STATUTES

Ariz. Rev. Stat. § 13-603(L) 5

Ariz. Rev. Stat. § 13-604.01 ..... 7, 9, 10, 11

Ariz. Rev. Stat. § 13-4037(B) ..... i, 1, 6, 8, 9, 10, 11, 12

COURT RULES

United States Supreme Court Rule 10 6

TABLE OF AUTHORITIES (Continued)

OTHER AUTHORITIES **Page**

Merriam Webster's Collegiate Dictionary (10th ed. 1997).....10

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend XIV: " . . . No State . . . shall deprive any person of life, liberty or property, without due process of law[.]"

A.R.S. § 13-4037(B): "Upon an appeal from the judgment or from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such a case, the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. Such sentence shall be enforced by the court from which the appeal was taken."

STATEMENT OF THE CASE

After the verdicts were rendered in Tony's case, the jurors learned of the mandatory sentencing enhancements that applied to his convictions. They were so shocked that they unanimously submitted this written, signed statement to the court: "We the jury would like to request executive clemency for Anthony Charles Davis. We feel the punishment for the crime is excessive."

Additionally, the jury foreman wrote a letter to the court and sent a copy to the Governor, which stated in part that, "we unanimously felt that the statute calls for far too excessive a length of incarceration, considering the facts of this case. (The consensual nature of the sexual acts, the lack of parental supervision, and the small relative age difference between the defendant and the

two girls, for examples.) I ask that you take whatever means are in your power to provide a just punishment for Mr. Davis. The 13-year-per-count sentence may be relevant in cases of rape or incest with a *minor child*, but seem quite unreasonable considering the facts of this case." (emphasis in the original).

Another juror wrote to the court and expressed the same sentiments. She felt that the law was "extreme and one sided." The sex was consensual, and Tony, "truly meant no criminal action." And, "[w]hile the punishment for Mr. Davis is extremely harsh, the young girls involved, should have a penalty to deal with. Mr. Davis's life is ruined forever, while these girls have the opportunity to do this over and over again without any [regard] for the other person."

The following facts show why the jurors were so upset about the mandatory consecutive, "flat-time" (no early release), 13-year minimum sentences per count. The victims are referred to by their first names only.

In January 1999, Tanya was 13. She and her friend Pam met a boy named Jason when they were hanging out at the mall. One night during the middle of the month, Tanya snuck out to meet Jason at the park. Jason drove her over to where Tony lived, and Tanya met Tony. (Reporter's transcript ("R") 10/20/99, 26-29.)

Tanya thought Tony was cute. Tony said he was 20, and Tanya told him she was 14. They hung out and had sex before Super Bowl weekend. Tanya had already had sex when she was 12, so she knew what was going on. (*Id.*, 29-32, 49-50.)

Tanya ran away and went back to the house during Super Bowl weekend to see Danny, a boy she liked. Danny was 15 or 16. She met him the same night that she met Tony. Pam was with her. She and Pam had already been back to the house several times. When Tanya saw

Danny they would kiss and hug. But she claimed that Tony was the one she had sex with the night before the police came. The sex was consensual. (*Id.*, 32-34, 37-39, 42, 47-48, 50.)

In January 1999, Pam was 14. Jason introduced her to Tony after she snuck out to the park. They went to Tony's house. Everyone there knew how old she was. To impress Tony, she told him that she wanted to be a model or an actress. She was excited that Tony, an older boy, wanted to have sex with her. They went to the bedroom and had sex. (*Id.*, 68-73; R 10/21/99, 6, 12-13.)

Pam told the police that she had sex with Tony on January 20th, 25th and 29th. When she went back, she really wanted to see Tony. The 29th was the Friday before the Super Bowl. (R 10/20/99, 74-75.)

Tony was working for Shane Greg as a painter during Super Bowl weekend. On January 29th, they worked from about 7:00 a.m. to 11:00 p.m. Tony slept at the job in his truck. On the 30th they worked from 7:00 to 5:00. On the 31st they started at 7:00 a.m. and worked straight through to 3:30 or 4:00 a.m. on February 1st. When Tony got home from working on February 1st, he was extremely tired and passed out on the couch. (R 10/21/99, 42-45, 63, 69-70, 89-90.)

Riki DeVoe was Tony's landlady. She saw Tanya at the house during Super Bowl weekend. Tanya said that she was 18; she never said that she was 14. Riki was very surprised when she found out how old the girls were. (*Id.*, 52-54, 58, 64.)

Tony denied that he ever had sex with Tanya. He had sex with Pam the first night that she came over. He felt that was the reason that she came over, and she knew what she was doing. She said that she was a model and would be flying to California to do some work. He

had no idea that she was only 14 and wouldn't have let her in the house if he'd known that. He had sex with her 2 or 3 times. He denied that he had sex with her on January 29th. He did go see her the night before that around 11:30 p.m. while she was babysitting. The next morning she called him and said that she was 16. He didn't have sex with her after that. (*Id.*, 64-65, 67-69, 71-74, 76, 79, 84-87, 95-96, 99-100, 102, 105-06.)

On February 1st, Officers Brown and Garza went looking for Tanya because she was a runaway. When Brown entered the house, he found Tony sleeping on a couch and Tanya sitting on another couch. The police told Tony that the girls were 12 or 13 and runaways. Tony freaked out. Tanya was nonchalant and knew that she shouldn't have been there. She denied having sex with the boys and said that she was not sexually active. Tanya later told Detective Alonzo that she had sex with Tony 2 or 3 times, and that the last time was Super Bowl weekend. (R 10/20/99, 14-17, 19-21, 24-25; R 10/21/99, 22-23, 27-28, 31-32, 69, 74-75, 99-100, 102.)

At sentencing, Tony's mother and stepfather spoke about his childhood physical abuse and his diagnosis of attention deficit disorder. He had spent time in a boys ranch and only finished 8th grade. His most recent psychologist assessed his mental and emotional capabilities as that of a 10 year old. (R 12/6/99, 5-7.) The State did not dispute any of this evidence, or present any contrary evidence.

According to the presentence report and its attachments, the mothers of the girls and the presentence writer thought that Tony should receive 5 years in prison, and the prosecutor recommended the minimum sentence possible.

Defense counsel told the court, "I don't think the legislature, and I think the court is aware of this, co[n]templated a sentence of this nature for this type of offense especially when

there is not violence and [there are] consensual acts of this nature. Therefore, the sentence I believe to be excessive, but I know the court is bound by the law. Therefore, request that the court impose the minimum sentence in this regard and also to enter a special order for executive clemency." The prosecutor joined in the request. (R 12/6/99, 5, 8-9, 13-14.)

The court found that probation was not a legal alternative, and that any aggravating circumstances were outweighed by the mitigating circumstances of Tony's age, his lack of record and, "the nature of the totality of the circumstances." It sentenced Tony to the minimum term of imprisonment possible under the charged statutes. (*Id.*, 9-10.)

The court then entered a supplemental order pursuant to A.R.S. § 13-603(L) stating that the required sentences were clearly excessive because, "[t]he defendant was 20 years of age at the time of the alleged offenses. The defendant has no adult criminal record. The defendant engaged in four unlawful acts of sexual intercourse with two females ages 13 and 14. The acts of sexual intercourse were consensual." (*Id.*, 13.) The court further noted that the prosecutor joined in the request for early application for executive clemency, and that, "after the jury learned of the mandated sentence required they unanimously requested executive clemency for the defendant." (*Id.*, 13-14.)

REASONS FOR DENYING THE PETITION

Under Rule 10 of this Court's Rules, certiorari review of a decision by a state court of last resort is appropriate primarily to review an important federal question that was decided in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, or an important question of federal law that has not been, but should be, settled by this Court, or has been decided in a way that conflicts with relevant decisions of this Court. Because none of these concerns are present here, Petitioner's request for certiorari review should be denied.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THE ARIZONA SUPREME COURT PROPERLY APPLIED TO THE FACTS OF THIS CASE THIS COURT'S TEST FOR GROSS DISPROPORTIONALITY UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION B EFORE I T F OUND PURSUANT TO ARIZONA LAW THAT THE SENTENCE WAS UNCONSTITUTIONAL BECAUSE IT "SHOCKED THE CONSCIENCE OF SOCIETY." THE ARIZONA SUPREME COURT THEN APPLIED, AND REMANDED THIS CASE FOR RESENTENCING PURSUANT TO, A.R.S. § 13-4037(B).

This Court will not review state cases where there are independent and adequate state grounds offered for the decision, even if those grounds are interwoven with federal law. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). And that is because those state cases aren't good vehicles for addressing federal issues. This is one of those cases.

In *Ewing v. California*, 538 U.S. 11 (2003), this Court was guided in its application of the Eighth Amendment by the proportionality principles in its cases that were distilled in Justice Kennedy's concurrence in *Harmelin v. Michigan*, 501 U.S. 95 (1991). *Ewing*, 538 U.S. at 23-24. Justice Kennedy identified, "four principles of proportionality review -- 'the primacy of the

legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors[.]'" These 4 principles informed the final principle: the Eighth Amendment forbids sentences that are "grossly disproportionate" to the crime. *Ewing*, 538 U.S. at 23, *quoting Harmelin*, 501 U.S. at 1001.

The *Davis* majority recognized the primacy of the legislature and its penological judgment. "We recognize society's strong interest in protecting children and appreciate that it is the legislature's province to assess the appropriate punishment for crimes against children." Pet. App. A at 13, ¶ 37. The Court had previously discussed the group of offenders that were targeted by A.R.S. § 13-604.01. "The legislative history indicates quite clearly that the enactment of § 13-604.01 was calculated to reach criminals who prey specifically upon children. The discussion before the House Judiciary Committee focused upon child sexual molestation, kidnapping, and child abuse. *See generally S.B. 1021, Sexual Offenses; Child Victims: Minutes of Meeting before the Arizona House Committee on Judiciary*, 37th Leg., 1st Sess. (Feb. 18, 1985). Of particular concern was the perceived recidivist nature of the people who commit these crimes." *State v. Williams*, 854 P.2d 121, 135 (Ariz. 1993).

The Court concluded that, "the legislature, in enacting § 13-604.01, was attempting to respond effectively to those predators who pose a direct and continuing threat to the children of Arizona. The lengthy periods of incarceration are intended to punish and deter those persons, and simultaneously keep them off the streets and away from children for a long time. The special penalties . . . are calculated to deal with persons peculiarly dangerous to children." *Id.* at 135-36.

In addition to recognizing the primacy of the legislature and its penological judgment, the *Davis* majority also recognized the legislature's acknowledgment that its penological judgment may result in excessive sentences due to, "the broad range of offenses encompassed by the statute under which [the defendant] was charged." Pet. App. A at 13, ¶ 37. And that legislative acknowledgment is contained in A.R.S. § 13-4037(B), which mandates that, "the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such a case, the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. Such sentence shall be enforced by the court from which the appeal was taken."

The failure of Petitioner and the *Davis* dissent to discuss, or even reference, the controlling statute here is puzzling, especially since the majority discussed the statute not once, but twice.

First, the *Davis* majority noted that it was aided in its proportionality review by this Court's recent decisions in *Ewing* and *Lockyer v. Andrade*, 538 U.S. 63 (2003). Pet. App. A at 9-10, ¶ 30. "In conducting its analysis in each case, the Supreme Court reviewed the specific facts and circumstances of the offense that led to the imposition of the three-strike enhancement, as well as reviewing each defendant's prior record." In *Ewing*, that included the specific facts of the triggering offense, that Ewing was on probation when he committed that offense, and Ewing's own long, serious criminal record. *Id.* at 10, ¶ 31, *citing Ewing*, 538 U.S. at [28-30], and *Lockyer*, 538 U.S. at [66-68]. "Thus, in conducting its proportionality review, the Court examined the specific facts and circumstances of the defendant's crime." *Id.* at 10-11, ¶ 31.

And in both cases, this Court considered that the prosecutor had the discretion to charge the crimes as misdemeanors or felonies and chose to charge the crimes as felonies. Furthermore, the trial judge could have, but did not, remove the sentence enhancement by defining the triggering offenses as misdemeanors rather than felonies. *Id.* at 19, ¶ 47 n.10, *citing Ewing*, 538 U.S. at [16-17], and *Lockyer*, 538 U.S. at [67-68].

But that was not the end of the analysis by the *Davis* majority. "One other factor motivates us to review the specific circumstances of Davis's case: The legislature permits this court to reduce lengthy sentences when 'the punishment imposed is greater than under the circumstances of the case ought to be inflicted.' A.R.S. § 13-4037(B) (2001) (allowing imposition of 'any legal sentence'). Although Davis's sentence fell within the legal sentencing range, if we find a sentence excessive, A.R.S. § 13-4037(B) imposes on us the duty to review the circumstances of the case to determine whether the sentence imposed is in fact unwarranted." *Id.* at 11, ¶ 33.

After recognizing the primacy of the legislature and its penological judgment, and analyzing the objective factors involved in *Davis*, the majority concluded that, "we cannot say that all incidents of sexual conduct are of equal seriousness and pose the same threat to their victims or to society. The broad range of offenses encompassed by the statute under which Davis was charged, coupled with the legislature's command in A.R.S. § 13-4037(B) and the Supreme Court's Eighth Amendment jurisprudence, impose on us the duty to apply the law to the specific facts of the cases that come before us to determine the constitutionality of sentences imposed." *Id.* at 13-14, ¶ 37. The majority ultimately remanded Tony's case so that he could be resentenced without the enhancements of A.R.S. § 13-604.01. *Id.* at 19-20, ¶ 48.

In addition to failing to address A.R.S. § 13-4037(B) at all, Petitioner and the *Davis* dissent appear to misunderstand what are "subjective factors" versus what are "objective factors."

The definitions of "subjective" include, "relating to or being experience or knowledge as conditioned by personal mental characteristics or states," "arising from conditions within the brain or sense organs and not directly caused by external stimuli," "arising out of or identified by means of one's perception of one's own state and processes," and, "lacking in reality or substance: illusory." *Merriam Webster's Collegiate Dictionary* (10th ed. 1997) at 1172. This contrasts with the definitions of "objective," which include, "of, relating to, or being an object, phenomenon, or condition in the realm of sensible experience independent of individual thought and perceptible by all observers: having reality independent of the mind," "perceptible to persons other than the affected individual," "involving or deriving from sense perception or experience with actual objects, conditions, or phenomena." *Id.* at 801.

The factors relied upon by the *Davis* majority were objective, not subjective. The fact that the sex acts at issue here were consensual was based upon the testimony of the girls and Tony at trial and contained in the transcripts. The fact that Tony had no adult criminal record was obtained from available written records and known to the trial judge, counsel for the parties and the presentence report writer. The fact that post-pubescent sex was common was discussed in published studies, both in hard copy form and on the Internet. The fact that Tony had impaired intellectual functioning and was immature was discussed at sentencing and undisputed by the State. The fact that the broad language of A.R.S. § 13-604.01 applies to pedophiles, as well as someone in Tony's situation, is obvious from simply reviewing the language of the statute. And the fact that no

one who knew the facts of this case, including the girls' mothers, believed that Tony should serve a sentence of imprisonment that was anywhere close to 52 years, is also readily ascertainable from the record via the court file, and the trial and sentencing transcripts. Pet. App. A at 12-14, ¶ 36-37 & n.5. Every factor relied upon by the *Davis* majority is something that is independent of any personal beliefs that the individual justices may have had. In other words, the factors relied upon were "objective."

It was only after concluding that Tony's sentence, "appear[ed] to be grossly disproportionate to his crimes" that the majority chose to engage in an intra- and inter-jurisdictional analysis because it, "agree[d] with the Supreme Court's suggestion that such an inquiry might validate the court's initial impression of gross disproportionality." Pet. App. A at 14, ¶¶ 37-38 & n. 6; *see*, *Harmelin*, 501 U.S. at 1005. And that analysis validated the majority's previous determination that Tony's sentence was grossly disproportionate to his crimes.

Having conducted the appropriate analysis, the *Davis* majority abided by previous determinations by the Arizona Supreme Court that, "when a punishment is 'so severe as to shock the conscience of society,' it 'violates the constitutional mandate.'" *Id.* at 20, ¶ 49, *quoting State v. (Randal) Davis*, 498 P.2d 202, 204 (Ariz. 1972). The majority then exercised the powers bestowed upon it by the legislature in A.R.S. § 13-4037(B), and it remanded Tony's case for resentencing without the mandatory enhancements of A.R.S. § 13-604.01.

CONCLUSION

"Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes[.]" *Solem v. Helm*, 463 U.S. 277, 290 (1983). But it is also true that, "no penalty is *per*

se constitutional." *Harmelin*, 501 U.S. at 1001, *quoting Solem*, 463 U.S. at 290. And the Arizona legislature recognized as much through its enactment of A.R.S. § 13-4037(B). Thus, and in light of the foregoing authorities and arguments, this Court should deny the Petition.

RESPECTFULLY SUBMITTED this 31st day of March, 2004.

MARICOPA COUNTY PUBLIC DEFENDER

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